NO. 87-938

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ARTHUR YOUNG & COMPANY,

Petitioner,

versus

THE BANK OF NEW ORLEANS AND TRUST COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED*

Is a movant entitled to entry of summary judgment in its favor when, contrary to Fed. R. Civ. P. 56, it fails to discharge its burden of production by either submitting evidence that negates an essential element of the nonmoving party's claim or by demonstrating that the nonmoving party's evidence is insufficient to establish an essential element of its claim?

*Pursuant to Supreme Court Rule 34.2, respondent submits this Question Presented because petitioner's Questions Presented are misleading insofar as they suggest that a party moving for summary judgment may shift the evidentiary burden of proof on an issue which has been raised by the non-mover but which movant does not discuss in its motion for summary judgment.

LIST OF PARTIES

Respondent herein, The Bank of New Orleans and Trust Company ("BNO"), was a Louisiana banking corporation which merged with First National Bank of Commerce, a national banking corporation. First National Bank of Commerce, as successor in interest to BNO, was substituted in the district court as the proper party plaintiff to this proceeding. For purpose of clarity, however, respondent will be referred to as "BNO" throughout this brief.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent herein, The Bank of New Orleans and Trust Company ("BNO"), respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed herein by Arthur Young & Company ("Arthur Young").

I. STATEMENT OF THE CASE

On July 1, 1982, BNO filed suit against Monco Agency, Inc. ("Monco") and Monco's president and principal shareholder, Oliver S. Montagnet, Jr. ("Montagnet"), alleging that it had extended loans in excess of 2.1 million dollars to Monco based on Monco and Montagnet's misstatements and omissions of material fact concerning the operations of Cottonbelt Insurance Company ("CBIC"), a wholly owned

subsidiary of Monco. BNO alleged that Monco and Montagnet had violated both the federal securities laws and the Louisiana Blue Sky Law. By way of amending complaint filed on May 31, 1984, BNO filed suit against Arthur Young alleging that Arthur Young, as the independent auditor of Monco and CBIC, had negligently conducted the audit for the year 1980 and had issued a misleading audit report upon which BNO relied in extending credit to Monco. BNO further alleged that Arthur Young's negligence was a direct and proximate cause of the loss incurred by BNO in excess of $2,000,000.00. BNO prayed for judgment against Monco, Montagnet and Arthur Young *in solido*[1] for the full amount of the bank's loss.

Arthur Young moved for summary judgment arguing that BNO's malpractice claim was prescribed under Louisiana's one year statute of limitations[2] because BNO had constructive or actual knowledge of a claim against Arthur Young in excess of one year prior to suit being filed against Arthur Young. It was this issue *only* which Arthur Young briefed and which Arthur Young submitted record evidence concerning. Nowhere in Arthur Young's initial summary judgment pleadings, affidavits or exhibits, did it address the issue of its solidary liability with Monco and Montagnet who were sued within a year of the default on the Monco loans. Thus, in its motion for summary judgment, Arthur Young did not address the Louisiana rule of law that timely suit against one solidary party interrupts prescription against all solidary

1. Under Louisiana law, an obligation is solidary when each obligor is liable for the whole performance. *See* La. Civ. Code arts. 1794 and 2324 (West Supp. 1987).

2. *See* La. Civ. Code art. 3492 (West Supp. 1987).

parties.[3] *See* La. Civ. Code arts. 1799 and 3503 (West Supp. 1987).

In opposition to Arthur Young's motion for summary judgment, BNO presented sworn deposition testimony reflecting that the bank did not have constructive or actual knowledge of a claim against Arthur Young more than one year prior to the filing of suit. *In addition*, BNO pointed out that it had sued Arthur Young as a solidary obligor with Monco and Montagnet, who were timely sued, and therefore prescription as to Arthur Young was interrupted. It was only in its reply memorandum in support of its motion for summary judgment that Arthur Young even mentioned its liability *in solido* with Monco and Montagnet. Even then, Arthur Young submitted no evidence whatsoever negating its solidary liability with Monco and Montagnet, but rather argued that as a matter of law there could not be a finding of solidary liability. Thus, at the trial court level, Arthur Young never treated the issue of its solidary liability as a factual issue. Indeed, neither did the district court which ruled, erroneously, that as a matter of law a negligent party could not be held *in solido* with a fraudulent party.

It was this *legal* issue[4] which BNO appealed to the United States Court of Appeals for the Fifth Circuit and which was

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3. Indeed, Arthur Young does not challenge that rule of law in its Petition to this Court. *See* Petitioner's Brief at 6-7, n.5.

4. The district court also ruled that BNO had constructive knowledge of Arthur Young's negligence prior to one year before suit was filed against Arthur Young. The Fifth Circuit did not reach this issue on appeal and that issue is not before this Court.

the basis for the Fifth Circuit's reversal of the district court's ruling:

> Arthur Young does not dispute the fact that the filing of suit against a solidary obligor interrupts prescription with regard to all other solidary obligors. . . . Rather, Arthur Young simply argues that it cannot be held solidarily liable *as a matter of law*. (Petitioner's Appendix at 11a) (emphasis added).

The Fifth Circuit ruled that there is no impediment to holding a fraudulent defendant (Monco and Montagnet) liable *in solido* with a negligent defendant (Arthur Young) when their concurrent fault has caused a single loss to the plaintiff. (Petitioner's Appendix at 15a). As a result, the Fifth Circuit found that BNO had properly alleged that Arthur Young was liable *in solido* for its negligence in connection with the audit of Monco and CBIC, and the timely filed suit against Monco and Montagnet interrupted prescription against Arthur Young as a *matter of law*. (Petitioner's Appendix at 19a).

II. SUMMARY OF ARGUMENT

While it is true that a non-movant who bears the burden of proof at trial must do more than rest on its pleadings in response to a properly confected motion for summary judment, such a burden is only shifted to the non-movant *after* the movant has discharged its initial burden of production. The moving party in a motion for summary judgment always bears the initial burden of demonstrating the absence of a genuine issue of material fact, and unless and until the movant has satisfied this burden the motion is not properly brought and the movant is not entitled to summary judgment regardless of which party bears the burden of proof at trial.

Arthur Young argues that BNO failed to submit any evidence of proof on the issue of solidary liability, an issue which BNO will bear the burden of proof at trial, and therefore it is entitled to judgment in its favor under *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986). Arthur Young ignores, however, the initial burden of production which Rule 56, Fed. R. Civ. P., and *Celotex* demand of all movants, and which it did not discharge at the time it brought its motion for summary judgment. Since petitioner failed to satisfy this burden of production, BNO was not required to submit any evidentiary proof regarding the issue of solidary liability, and, as a result, the Fifth Circuit, in accordance with *Celotex*, properly ruled that Arthur Young's motion for summary judgment should not have been granted.

III. ARGUMENT

THERE IS NO CONFLICT WITH DECISIONS OF THIS COURT

A. The Party Seeking Summary Judgment Always Bears The Initial Burden Of Demonstrating The Absence Of A Genuine Issue Of Material Fact.

In petitioning this Honorable Court, Arthur Young principally relies on the decision in *Celotex Corp. v. Catrett*, 106 S.Ct. 2548 (1986), wherein the Court clarified the appropriate standard for a motion for summary judgment. Arthur Young cites *Celotex* for the proposition that where a nonmoving party will bear the burden of proof at trial on a dispositive issue, that party is required to go beyond the allegations in the pleadings and must designate specific facts showing a genuine issue for trial. Arthur Young fails, however, to acknowledge that before the burden of proof shifts to the nonmoving party, the moving party must always satisfy the initial burden of demonstrating the absence

of a genuine issue of material fact.[5]

The Court clearly enunciated the movant's initial burden in *Celotex*:

> Of course, a party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any,' which it believes demonstrate the absence of a genuine issue of material fact. 106 S.Ct. at 2553.

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5. Arthur Young also cites the Court's decisions in *Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S.Ct. 1348 (1986), in support of its argument. The Court in *Anderson*, however, did not even *reach* the issue of whether the moving party discharged its initial burden. As the Court noted:

> Our analysis here does not address the question of the initial burden of production of evidence placed by Rule 56 on the party moving for summary judgment. See *Celotex Corp. v. Catrett*, _____ U.S. _____, 106 S.Ct. _____, 90 L.Ed.2d _____ (1986). Respondents have not raised this issue here, and for the purposes of our discussion we assume that the moving party has met initially the requisite evidentiary burden. 106 S.Ct. at 2511, n.5.

Similarly, in *Matsushita*, decided prior to *Celotex*, the Court observed that a moving party does have an initial burden of production, but the issue of whether or not the moving party had discharged its initial burden was not before the Court. 106 S.Ct. at 1355, n.10.

The moving party must always discharge its burden before the non-movant is required to respond to the summary judgment motion, and the burden has not been discharged if the movant simply states that the non-movant has failed to submit any evidence on an issue:

> It is not enough to move for summary judgment without supporting the motion in any way or with a conclusory assertion that the plaintiff has no evidence to prove his case. 106 S.Ct. at 2555 (White, J. concurring).

In the *Celotex* dissent, Justice Brennan elaborated more fully on the way in which the burden shifts between the parties to the action, as well as how the burden can be satisfied,[6] when he noted that "the burden of establishing the non-existence of a 'geniune issue' is on the party moving for summary judgment," 106 S.Ct. at 2556, and explained that the burden is composed of two distinct parts:

> [A]n initial burden of production, which shifts to the nonmoving party if satisfied by the moving party; and an ultimate burden of persuasion, which always remains on the moving party. *See* 10A Wright, Miller, & Kane §2727. The court need not decide whether the moving party has satisfied its ultimate burden of persuasion unless and until the Court finds that the moving party has discharged its initial burden of production. 106

6. "Although the [*Celotex*] Court issued a five to four decision, the majority and dissent both agreed as to how the summary judgment burden of proof operates; they disagreed as to how the standard was applied to the facts of the case." C. Wright, A. Miller, and M. Kane, 10A *Federal Practice and Procedure*, Section 2727, p. 21 (2d Ed. 1987 Supp.) (footnote omitted).

> S.Ct. at 2556-57 (Brennan, J. dissenting) (footnote omitted).

If the nonmoving party will bear the burden of proof at trial, the moving party may satisfy its initial burden of production by either submitting "affirmative evidence that negates an essential element of the nonmoving party's claim" or by demonstrating to the court that "the nonmoving party's evidence is insufficient to establish an essential element of the nonmoving party's claim." 106 S.Ct. at 2557 (Brennan, J. dissenting). Should the moving party adopt the second option and seek summary judgment by demonstrating the absence of evidence in the record, its burden of production would entail more than merely stating that the non-movant has failed to submit any evidence in opposition to the summary judgment:

> Plainly, a conclusory assertion that the nonmoving party has no evidence is insufficient. See *ante*, at 2551 (WHITE, J., concurring). Such a 'burden' of production is no burden at all and would simply permit summary judgment procedure to be converted into a tool for harassment. See Louis 750-751. Rather, as the Court confirms, a party who moves for summary judgment on the ground that the nonmoving party has no evidence must affirmatively show the absence of evidence in the record. *Ante*, at 2553. This may require the moving party to depose the nonmoving party's witnesses or to establish the inadequacy of documentary evidence. If there is literally no evidence in the record, the moving party may demonstrate this by reviewing for the court the admissions, interrogatories and other exchanges between

> the parties that are in the record. Either way, however, the moving party must affirmatively demonstrate that there is no evidence in the record to support a judgment for the non-moving party. 106 S.Ct. at 2557-58 (Brennan, J. dissenting).

Justice Brennan concluded that "[i]f the moving party has not fully discharged this initial burden of production, its motion for summary judgment must by denied . . .". *Id.*

In *Chipollini v. Spencer Gifts, Inc.*, 814 F.2d 893, 896 (3rd Cir. 1987), *cert. dismissed*, 108 S.Ct. 26 (1987), the Third Circuit Court of Appeals adhered to the standards outlined in *Celotex* and held that if the non-movant would bear the burden of persuasion at trial then,

> [T]he party moving for summary judgment may meet its burden by showing that the evidentiary materials of record, if reduced to admissible evidence, would be insufficient to carry the nonmovant's burden of proof at trial. (Citing *Celotex*).

Similarly, the Ninth Circuit in *Lake Nacimiento Ranch Co. v. San Luis Obispo County*, 830 F.2d 977 (9th Cir. 1987), held that the party seeking summary judgment bears the initial responsibility of informing the district court of the basis of its motion and of identifying those portions of the record which it believes demonstrate the absence of a genuine issue of material fact. *See also Greenberg v. Food & Drug Administration*, 803 F.2d 1213 (D.C. Cir. 1986) (citing *Celotex* and holding that as a threshold matter the moving party must demonstrate the absence of evidence in the record and only after meeting this burden will the nonmoving party be required to demonstrate that an issue of material

fact does exist); *Windon Third Oil and Gas Drilling Partnership v. Federal Deposit Insurance Corporation*, 805 F.2d 342 (10th Cir. 1986), *cert. denied*, 107 S.Ct. 1605 (1987).

The fallacy of Arthur Young's argument is, therefore, that it did not discharge its burden in bringing the motion for summary judgment.[7] As discussed above, Arthur Young chose to ignore the issue of solidary liability when it moved for summary judgment and in so doing failed to comply with the requirements of Rule 56, as clarified in *Celotex*, by showing that "there is an absence of evidence" to support BNO's claim. 106 S.Ct. at 2554. As a result, the motion was not properly confected.

B. The Fifth Circuit Properly Recognized That Arthur Young & Company Failed To Discharge Its Initial Burden Of Production.

Arthur Young argues that the Fifth Circuit's ruling conflicts with *Celotex* and with the language of Rule 56(e), Fed. R. Civ. P., because "BNO needed to present sufficient evidence upon which a jury reasonably could find that Arthur Young was solidarily liable with the defendants sued in 1982, . . .", (Petitioner's Brief at 12-13), and such ab-

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7. In addition to *Celotex*, Arthur Young also relies on *Slaughter v. Allstate Ins. Co.*, 803 F.2d 857 (5th Cir. 1986); and *Fontenot v. Upjohn Co.*, 780 F.2d 1190 (5th Cir. 1986). *Slaughter* only dealt with the burden on the non-movant in response to a "proper" motion for summary judgment. In *Fontenot*, a case decided prior to *Celotex*, the Fifth Circuit noted that the movant may not simply show that the plaintiff has failed to submit any evidence in support of its claim, but that the movant must go further and is required to "establish" the absence of material fact.

sence of proof requires a reversal of the Fifth Circuit decision.[8] Arthur Young, however, has failed to show that it ever satisfied its own initial mandatory burden of production. This fact was recognized by the Fifth Circuit when it stated:

> Whether Arthur Young is liable *in solido* with the other defendants for BNO's loss is the ultimate issue in this case, and in the district court BNO must prove that Arthur Young's negligence played a part in causing its loss on the Monco loan. The focus of Arthur Young's summary judgment motion, however, was not factual liability. *Arthur Young did not submit or argue facts which showed that it did not conduct the audit in question or that BNO did not rely on the audit in extending the loan.* (Petitioner's Appendix at 10a) (emphasis added).

Thus, in its brief filed with this Court, Arthur Young does not even *address* its initial burden. Instead it argues that since BNO is a nonmoving party with the burden of proof at trial, *it* must submit evidence "sufficient to create a triable factual dispute." (Petitioner's Brief at 14). This argument is legally and factually incorrect. In its motion for summary judgment Arthur Young confined its argument and proof to the issue of whether BNO had actual or constructive

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8. Arthur Yong cites *Hilbun v. Goldberg*, 823 F.2d 881 (5th Cir. 1987), for the proposition that solidary liability must be proved and cites *Moor v. Travelers Insurance Co.*, 784 F.2d 632 (5th Cir. 1986); and *United Klans of America v. McGovern*, 621 F.2d 152 (5th Cir. 1980), for the proposition that a party asserting a tolling theory of prescription bears the burden of proof. BNO does not disagree with the holdings of these cases, but rather contends that no such burden has been shifted to BNO in the summary judgment proceeding, since Arthur Young failed to discharge its initial burden of production.

knowledge of the potential claim against Arthur Young more than one year prior to the filing of suit. BNO responded to the motion by filing affidavits and submitting evidence demonstrating that it did not have constructive knowledge of such a claim, *and* by showing that Arthur Young was sued as a solidary obligor with other timely sued defendants and therefore prescription was interrupted as to Arthur Young. In its reply memorandum in support of its motion, Arthur Young *only* addressed the *legal* significance of BNO's solidary liability theory:

> Reply is necessary because the *in solido* theory offered by BNO to avoid the prescription bar does not and cannot apply here as a *matter of law*. (Petitioner's Reply Memorandum in Support of its Motion for Summary Judgment at p. 1) (emphasis added).

Petitioner *has never* argued that it was not *factually* liable *in solido* with Monco, only that *as a matter of law* it could not be held liable *in solido*. Clearly, no burden of production could have been discharged at the district court level when Arthur Young did not even address the question of whether it was solidarily liable with Monco and Montagnet. Arthur Young has never come forward and identified portions of the record which would demonstrate that it is not solidarily liable,[9] and therefore in no way affirmatively discharged its burden of production. Instead, it merely contends that

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9. It is submitted that Arthur Young did not make that argument or submit factual evidence negating its solidary liability because it knew there was record evidence establishing Monco and Montagnet's fraud (false financial statement provided to BNO) as well as establishing Arthur Young's negligence in the conduct of the audit of Monco and CBIC (failure to detect and reserve for huge losses experienced by CBIC).

BNO has failed to offer any evidence which would prove the solidary liability theory. Again, Arthur Young may not shift the burden of proof to BNO without first making the requisite showing of the absence of a genuine issue of material fact.

The Fifth Circuit, in finding that Arthur Young had not raised the issue of solidary liability and thereby had not negated such a basis for its liability, found that Arthur Young had not carried its initial burden of proof and therefore "BNO did not fail to sustain its summary judgment burden." (Petitioner's Appendix at 10a).

Clearly, the Fifth Circuit's ruling in no way conflicts with the Court's decision in *Celotex*. In this case, from the district court level through its Petition to this Court, Arthur Young has entirely failed to present evidence negating its solidary liability, and has thereby totally ignored its burden of proof in bringing its motion for summary judgment. For this reason, the decision of the Fifth Circuit is proper and is in full accord with the holding of *Celotex*.

IV. CONCLUSION

Arthur Young, in bringing its motion for summary judgment, failed to carry its burden of demonstrating the absence of a genuine issue of material fact. Its motion was, therefore, not properly confected, and as a matter of law it was not entitled to summary judgment under Rule 56. The Fifth Circuit properly recognized that fact and overruled the district court's ruling granting the motion.

Because the Fifth Circuit's ruling is a correct application of Rule 56 and this Court's holding in *Celotex*, it is respectfully submitted that this Honorable Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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